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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MARCELINO ZUNIGA,

Defendant and Appellant.

C061623

(Super. Ct. No. SF110743A)

In the early morning, while defendant Marcelino Zuniga was arguing with his girlfriend behind a vehicle in the middle of a street, a police officer approached the scene. After a brief discussion with defendant, the officer arrested him for public intoxication. A subsequent search of defendant and the vehicle (in which he had been a passenger) revealed he was in possession of cocaine. The trial court denied defendant's motion to suppress evidence, and he pled guilty to possession of a narcotic for sale. The court sentenced him to one year in jail.

Defendant appeals, contending the trial court erred in denying his motion to suppress. Defendant argues his arrest was

not supported by probable cause because he "had committed no observed violation of the law" and thus "[a]ny later search of his person and/or the vehicle cannot be justified based upon that illegal detention and arrest."<sup>1</sup> We disagree and affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

On an early morning, around 2:00 a.m., in January 2009, Stockton Police Officer Matthew Boone was on patrol at South Lincoln Street and Charter Way. As the officer approached the intersection, he noticed a vehicle in the turn lane of southbound Lincoln Street blocking traffic. Defendant and a woman were arguing in the middle of the street behind the vehicle.

Officer Boone approached defendant and separated him from the woman. As soon as Officer Boone spoke with defendant, he

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<sup>1</sup> In his reply brief, defendant addresses -- for the first time -- issues of standing, consent, and the retroactivity of *Arizona v. Gant* (2009) \_\_\_\_ U.S. \_\_\_\_ [173 L.Ed.2d 485] -- all relating to the search of the vehicle following his arrest. It is a fundamental rule of appellate practice that issues raised for the first time in a reply brief will not be considered. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) While we are aware the People have addressed these issues in their respondent's brief, it still holds true that by failing to raise these points at the outset in his opening brief, defendant has deprived the People of the opportunity to respond to his arguments regarding these contentions.

In his opening brief, defendant challenges the searches of his person and the vehicle only on the basis that his arrest was not supported by probable cause. We therefore limit our discussion to whether there was probable cause to arrest defendant.

noticed signs of intoxication. Officer Boone testified, "I smelled the smell of an alcoholic beverage coming from him. I s[aw] that his eyes were red and watery. His speech was slightly slurred. He immediately got a small bit of attitude. . . . [H]e was arguing out in the middle of a busy street, in the middle of the night, that he had alcohol in his system. I felt he was a danger to himself so I placed him under arrest."

Officer Boone did not see defendant stumbling and he did not perform any field sobriety tests or give a preliminary alcohol screening test before arresting defendant for public intoxication. From the moment Officer Boone made a right turn on South Lincoln Street to the time he placed defendant under arrest was approximately two minutes. A subsequent search of defendant and the vehicle (in which he had been a passenger) revealed defendant was in possession of cocaine.

At the hearing on the motion to suppress, the trial court ruled there was probable cause to arrest defendant for public intoxication. The court reasoned as follows: "I think when you come upon . . . people arguing in the middle of the night out in the middle of the street, that the officers have a duty to approach. . . . And once he approaches, he's there two minutes. Two minutes doesn't sound like very long, but it's long enough to determine whether somebody is unable to care for their safety. And the officer testified he noticed objective signs of intoxication, smell of alcohol, red and watery eyes, slightly slurred speech. The defendant immediately got a bit of an

attitude, wasn't happy that the police were there, and was out in the middle of a busy street. So that in and of itself shows that he's unable to care for himself. That's not a smart thing to do. . . . He notices objective signs that give him probable cause to arrest for [public intoxication]."

## DISCUSSION

### I

#### *Legal Principles*

"In reviewing the trial court's ruling on the suppression motion, we uphold any factual finding, express or implied, that is supported by substantial evidence, but we independently assess, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness." (*People v. Hughes* (2002) 27 Cal.4th 287, 327.)

"Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime." (*People v. Kraft* (2000) 23 Cal.4th 978, 1037.)

The offense of public intoxication is committed when a person "is (1) intoxicated (2) in a public place and either (3) is unable to exercise care for his own safety or the safety of others or (4) interferes with or obstructs or prevents the free use of any street, sidewalk or public way." (*People v. Lively* (1992) 10 Cal.App.4th 1364, 1368-1369; Pen. Code, § 647, subd. (f).) Defendant concedes the second element of the offense was met. His only contentions on appeal are that:

(1) he was not intoxicated; and (2) he did not present a danger to himself or to the safety of others.<sup>2</sup>

## II

### *Intoxication*

Defendant argues "there did not exist sufficient evidence . . . to establish [he] was intoxicated." He contends the observations of Officer Boone show only that he "had been drinking" and not "that he was in an intoxicated state." Probable cause for arrest, however, is not determined by whether the officers acted on evidence that is sufficient to convict. (*People v. Ingle* (1960) 53 Cal.2d 407, 412-413.) "The standard of probable cause to arrest is the probability of criminal activity, not a prima facie showing." (*People v. Lewis* (1980) 109 Cal.App.3d 599, 608, citing *People v. Moore* (1970) 13 Cal.App.3d 242, 436.) Therefore, the officer needed only facts that would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that defendant was intoxicated and not evidence showing *beyond all reasonable doubt* that defendant was intoxicated. Here, Officer Boone smelled alcohol coming from defendant, saw his eyes were red and watery, and heard his speech was slightly slurred. These articulable

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<sup>2</sup> Defendant does not address the fourth element -- whether he was interfering with or obstructing or preventing the free use of any street, sidewalk or public way. Because we conclude there was probable cause to believe defendant was unable to exercise care for himself, we need not address whether there was also probable cause to believe he was interfering with the use of a public street.

facts were sufficient to lead a person of ordinary care and prudence to entertain an honest and strong suspicion that defendant was intoxicated.

### III

#### *Safety Of Himself Or Others*

When determining whether an intoxicated person can exercise care for his or her own safety or the safety of others, we must consider the totality of circumstances. (*People v. Lively*, *supra*, 10 Cal.App.4th at p. 1372.) Here, there were sufficient facts under the totality of the circumstances for a person of ordinary care and prudence to entertain an honest and strong suspicion that defendant was unable to care for his own safety. Part of the purpose of Penal Code section 647, subdivision (f) is to "protect the offender himself from the results of his own folly." (*People v. Belanger* (1966) 243 Cal.App.2d 654, 662.) Here, concern for defendant's safety was particularly significant because he was arguing in the middle of the street. At any time defendant could have been injured by an unsuspecting driver traveling down the road. When an officer encounters an individual arguing in the middle of the street and displaying objective signs of intoxication, it is reasonable for the officer to entertain a strong suspicion that the individual is unable to exercise care for his own safety. Accordingly, there was probable cause to arrest defendant for public intoxication.

Defendant contends "there were no articulated observations of Officer Boone indicating [defendant] was unable to walk, talk or care for himself. . . . While this evidence may establish

[defendant] had been drinking, it in no way establishes he was in a state where he was unable to care for himself.” Defendant’s lack of stumbling, however, is not dispositive because probable cause is based on the totality of the circumstances of all of the facts known to the arresting officer at the time of arrest. (*People v. Lively, supra*, 10 Cal.App.4th at p. 1372.) The fact that defendant was not stumbling does not negate the fact that he was arguing in the middle of a busy street while exhibiting signs of intoxication. Under the totality of the circumstances, this information furnished probable cause to arrest defendant despite his lack of stumbling.

Defendant also errs in contending the two-minute time span “simply does not provide a sufficient length [of time] for Boone to observe [defendant] and make a determination that not only was he under the influence of alcohol, but also whether he was in a position where he was unable to care for himself or presented a danger to others.” In making this argument, defendant overlooks the fact that “[N]o exact formula tells us how to decide whether there was probable cause to arrest.” (*People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1742.) As the trial judge pointed out, “Two minutes doesn’t sound like very long, but it’s long enough to determine whether somebody is unable to care for their [sic] safety.” We agree with the trial court. Even though Officer Boone spent less than two minutes with defendant, under the totality of the circumstances, this

was enough time to give the officer probable cause to believe defendant was unable to care for his own safety.

Because there was probable cause to arrest defendant for public intoxication, the trial court did not err in denying defendant's motion to suppress.

DISPOSITION

The judgment is affirmed.

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ROBIE, J.

We concur:

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NICHOLSON, Acting P. J.

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BUTZ, J.